STATE OF MICHIGAN

COURT OF APPEALS

RALPH DALEY,

Plaintiff-Appellant,

v

CHARTER TOWNSHIP OF CHESTERFIELD and SHAWN SHORTT,

Defendants-Appellees.

UNPUBLISHED
June 25, 2009

No. 285723
Macomb Circuit Court
LC No. 2007-002847-AW

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

In this zoning dispute, plaintiff appeals from the order of the trial court granting defendants' motion for summary disposition under MCR 2.116(C)(4), (8) and (10). We affirm.

This case involves § 76-331(a)(2) of defendant Chesterfield Township's zoning ordinance, which prohibits accessory buildings such as attached or detached garages from housing more than three cars and exceeding 920 square feet. Plaintiff Richard Daley sought to build a 910 square-foot garage with two sixteen–foot-long garage doors that could house four cars. In 2004, plaintiff applied to the township's zoning board of appeals (ZBA) for a variance from § 76-331, which was denied. Plaintiff failed to appeal the decision within the required 21 days, and instead filed a complaint in Macomb Circuit Court claiming the ordinance provision was unconstitutionally vague. The court dismissed the complaint, and this Court affirmed. *Daley v Charter Twp of Chesterfield*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 265363). This Court held that "[o]ne way in which a garage designed to hold more than three cars is manifested is by having two sixteen-foot-long doors." *Id.* at 2. In 2007, plaintiff submitted a revised plan to the township that replaced the parking space for a fourth car with a 100 ft. craft room. However, the revised garage still called for two sixteen-foot garage doors, so the township's building official, defendant Shawn Shortt, denied the plans as not complying with the zoning ordinance. Plaintiff argues that the township was obligated to approve the plans because he complied with the ordinance, so he requested an appeal to the township's construction board of appeals. Defendants countered that the decision was not a construction code dispute, but a zoning ordinance dispute. Plaintiff then filed this suit seeking approval of his revised plans without appealing to the township ZBA or applying for a variance.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Collins v Comerica Bank*, 468 Mich 628, 631; 664 NW2d 713 (2003). A motion for summary disposition under MCR 2.116(C)(4) is appropriate when the court lacks subject matter jurisdiction. Under MCR 2.116(C)(4), when a plaintiff has failed to exhaust his administrative remedies, summary disposition for lack of jurisdiction is proper. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000). A motion for summary disposition under MCR 2.116(C)(8) is appropriate where the plaintiff failed to state a claim on which relief can be granted. *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000). Because plaintiff failed to exhaust all administrative remedies, the trial court properly granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(4) and (8).

The proper avenue for plaintiff's appeal was to the township's ZBA, not the construction board of appeals. The state construction code at MCL 125.1511(1) provides:

> If the application conforms to this act, the code and the *requirements of other applicable laws and ordinances*, the enforcing agency shall approve the application and issue a building permit to the applicant. . . . Failure by an enforcing agency to grant, in whole or in part, or deny an application within these periods of time shall be deemed a denial of the application for purposes of authorizing the institution of an appeal to the *appropriate board of appeals*. [Emphasis added.]

In determining the appropriate board of appeals, MCL 125.1502a(1)(m) provides that "[c]onstruction regulation does not include a zoning ordinance or rule issued pursuant to a zoning ordinance and related to zoning." Then, pursuant to MCL 125.3603(1), "[t]he zoning board of appeals . . . shall hear and decide appeals from and review any administrative order, requirement, decision, or determination made by an administrative official or body charged with the enforcement of a zoning ordinance adopted under this act." At issue in this case is whether the revised plans comply with Chesterfield Township Zoning Ordinance § 76-331(a)(2)(a). In plaintiff's letter submitting his revised plans he stated that with the change in design the building "should" now be in compliance with the ordinance. Therefore, the appropriate board of appeals is the ZBA.

In addition, the crux of the 2007 and 2004 plans are not exactly the same as defendants argue, so the ZBA has not already made a final decision on the issue against plaintiff. The 2007 plans were revised to include a craft room, which could rebut the presumption decided in the first ZBA decision that two sixteen-foot garage doors means a four-car garage. Because the crux of the 2007 and 2004 plans were not the same, pursuant to MCL 125.3603(1) an appeal regarding the 2007 revised plans must be taken to the ZBA.

Plaintiff argues that an appeal to the ZBA would be futile because the board is biased against him. Futility is an exception to the exhaustion of the administrative remedies doctrine. *Citizens for Common Sense in Gov't*, *supra* at 51. However, the futility exception to the exhaustion of the administrative remedies doctrine does not apply when a plaintiff maintains the zoning board is biased against him, when bias is impossible to determine because the plaintiff has failed to obtain a final decision from the board. *Papas v Gaming Control Bd*, 257 Mich App

647, 665; 669 NW2d 326 (2003). Without giving the ZBA a chance to make a final decision, it is impossible to determine that the ZBA is biased against plaintiff.

Plaintiff must also appeal the township's decision to the ZBA before he can bring his 42 USC 1983 claim. The United States Supreme Court has held that 42 USC 1983 cases are exempt from the exhaustion of the administrative remedies doctrine. *Patsy v Florida Bd of Regents*, 457 US 496, 550; 102 S Ct 2557; 73 L Ed 2d 172 (1982). However, the Court in *Williamson Co Regional Planning Comm v Hamilton Bank of Johnson City*, 473 US 172, 186; 105 S Ct 3108, 87 L Ed 2d 126 (1985), set out a finality requirement that a plaintiff must obtain a final decision regarding the application of a zoning ordinance from the appropriate administrative body prior to initiating a 42 USC 1983 action. *Electro-Tech v Campbell Co*, 433 Mich 57, 81; 445 NW2d 61 (1989). Thus, plaintiff has to receive a final decision from the ZBA before he can bring his 42 USC 1983 claim.

Because plaintiff's failure to exhaust all his available administrative remedies by appealing to the township ZBA determines the outcome of this case, we need not address the other issues raised on appeal. Therefore, we affirm the trial court's order granting defendant's motion for summary disposition pursuant to MCR 2.116(4) and (8).

Affirmed. Defendants may tax costs.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray